



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

February 13, 1990

Mr. James B. Bond  
Deputy Chancellor  
Texas A & M University System  
Office of General Counsel  
300 System Administration Bldg.  
College Station, Texas 77843

Open Records Decision No. 539

Re: Whether records of interview of former student by university personnel covering events of the student's collegiate career fall within section 3(a)(14) and 14(e) of article 6252-17a, V.T.C.S. (RQ-1739)

Dear Mr. Bond:

You have received a request under the Open Records Act, article 6252-17a, V.T.C.S., for the records of an interview of a former student of Texas A & M University that was conducted by the general counsel of the university and the vice president of finance and administration. The interview was recorded on two audio cassettes using both sides of one cassette and one side of the other. Its total running time is over two hours. The former student had been recruited by Texas A & M University to play football, had attended for a time, and had transferred to another university almost four years before the interview took place. He was interviewed about allegations he had made and later retracted as false to the effect that Texas A & M had violated NCAA regulations. He answered questions about his recruitment by Texas A & M and other schools, the events of his attendance at that university, his contacts with Texas A & M coaches after transferring to another university, and other events of his life after leaving Texas A & M. Some of the information included on the tape recordings has appeared in newspaper articles or was included in documents already made available to the requestor. See Open Records Letter OR89-88 (1989).

Your letter states that the interview was conducted informally and includes references to events occurring during the former student's collegiate career, names of other students at Texas A & M University and information about their collegiate careers, and personal information

about the former student's family relationships. You believe that the right of privacy incorporated by section (3)(a)(1) of the Open Records Act and the exceptions for student records in sections 3(a)(14) and 14(e) of the act except some of the information given on the tape. You further assert that this information is so intertwined on the tapes that any attempt to separate the withholdable information from the disclosable information would give an unfair picture of the essence of the conversation.

Section 14(e) of the Open Records Act provides as follows:

Nothing in this Act shall be construed to require the release of information contained in education records of any educational agency or institution except in conformity with the provisions of the Family Educational Rights and Privacy Act of 1974, as enacted by Section 513 of Public Law 93-380, codified as Title 20 U.S.C.A. Section 1232g, as amended.

V.T.C.S. art. 6252-17a, § 14(e).

The Family Educational Rights and Privacy Act (FERPA) provides that no federal funds will be made available to an educational institution that permits the release of education records without the written consent of a student's parents to any individual, agency, or organization other than those specifically designated therein. 20 U.S.C. § 1232g(b)(1). When a student has attained eighteen years of age, or is attending an institution of postsecondary education, the student has the sole authority to consent. Id. § 1232g(d).

The records requested in this case were created after the student had left Texas A & M University. Because of this fact, we were uncertain as to whether the audio cassettes constituted "education records" as defined by FERPA and the regulations promulgated thereunder. We referred this question to the Family Policy and Regulations Office, United States Department of Education, which provides technical assistance to ensure compliance with the act. 34 C.F.R. § 99.60(b)(2). We received the following answer:

Under section 99.30 of the FERPA regulations, an educational institution must generally obtain a student's prior written

consent before disclosing personally identifiable information from the education records of the student. Section 99.3 defines 'education records' as those records that are directly related to a 'student' and maintained by an educational agency or institution. The Section 99.3 definition of 'student' states: "Student," except as otherwise specifically provided . . . means any individual who is or has been in attendance at an educational agency or institution. . . .' (Emphasis added.) Thus, the term 'education records' includes those records that are directly related to a former student as well as a current student.

The letter pointed out that the regulations exclude from the definition of "education records" those records "that only contain information about an individual after he or she is no longer a student at that agency or institution." 34 C.F.R. 99.3 (definition of "education records" para. (b)(5)) (emphasis added). It went on to state as follows:

Under the provisions of the FERPA regulations as discussed above, the tape recordings at issue would fall within the definition of 'education records' because they are directly related to a student, they contain information about a former student while the individual was a student at the institution, and they are maintained by an educational agency or institution. Thus, any portions of the recordings that are personally identifiable to a former student and that pertain to the student's grades, attendance, or experience at the institution must be protected in accordance with the disclosure provisions of the FERPA regulations, while any personally identifiable information that pertains to a former student 'after his departure' from the University could be disclosed without violating FERPA. (Emphasis in original.)

In addition, we believe that the portions of the interview relating to the individual's recruitment by Texas A & M University are education records, even though such information relates to contacts between the university and the individual before he enrolled. Recruitment information

is "information directly related to a student" that is "maintained by an educational agency or institution." 20 U.S.C. § 1232g(a)(4)(A). Information relating to a time prior to the student's enrollment may constitute education records, as is shown by provisions excepting financial records of parents and letters of recommendation from the various rights that FERPA grants students. For example, an applicant for admission may waive his right of access to confidential statements respecting admission to an educational agency or institution. Id. § 1232g(a)(1)(C); 34 C.F.R. § 99.12(b). The fact that such a waiver is even necessary shows us that letters supporting an individual's admission to a school would otherwise be education records. In addition, the provision excluding from the term "student" a person who has not been in attendance at such agency or institution indicates that records pertaining to that person would otherwise be "education records." 20 U.S.C. § 1232g(a)(6).<sup>1</sup>

We have listened to the tape recording and prepared a memorandum identifying the portions of it that are excepted from disclosure by the Family Educational Rights and Privacy Act. The portions of the tape dealing with the former student's recruitment also include much of the personal

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1. In Vandiver v. Star-Telegram, Inc., 756 S.W.2d 103 (Tex. App. - Austin 1988, no writ), the appellate court upheld a summary judgment ordering the president of Texas A & M University to comply with a request under the Open Records Act for records of the recruitment of a high school athlete. The university had not requested an attorney general's ruling on this information pursuant to section 7(a) of the act and had thus raised a presumption that the information was public. To overcome this presumption, the university had to prove not only that the records were education records within the Family Educational Rights and Privacy Act, but also that neither the student nor his parents had consented to make the records public. The university failed to present summary judgment proof that consent had not been given. The present case is easily distinguishable because the university did seek a ruling from this office pursuant to section 7(a) of the Open Records Act. Vandiver moreover tends to support our conclusion that records of a student-athlete's recruitment are education records within the Family Educational Rights and Privacy Act.

information about his family relationships that you believe is excepted by the privacy rights incorporated into section 3(a)(1) of the Open Records Act. Since these portions of the tape recording are excepted by section 14(e), we need not consider whether they would otherwise be excepted by section 3(a)(1).

We have also identified some portions of the tape recording which are not excepted by section 14(e) but are excepted by a right of privacy incorporated into section 3(a)(1) of the Open Records Act. The subject matter of these portions is the former student's motivation for making and later retracting allegations that Texas A & M had violated NCAA regulations, a subject addressed at more than one point in the interview. Some of the statements are factual and merely relate information that the student provided at a press conference. See Sherrington, Texas A & M's Sherill says he plans to stay on, Dallas Morning News, Nov. 21, 1988. We have determined that these factual statements are open to the public because the former student waived any interest in privacy that might otherwise apply when he made similar statements at a press conference. In other cases, his remarks about his motives have an emotional content that brings them within the exception for information deemed confidential by a common-law right of privacy under section 3(a)(1). Information is protected by this privacy right if:

(1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 683 (Tex. 1976), cert. denied, 430 U.S. 930 (1977).

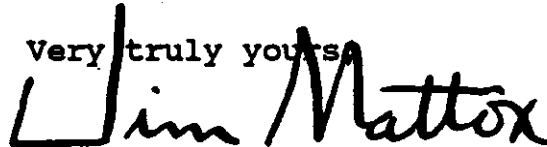
In our opinion, information that an individual gives about his thoughts or feelings can fit this definition. The "highly intimate or embarrassing facts" that the test requires may be facts about the individual's subjective emotional state. They do not have to be facts about conduct or events. See generally id. Our memorandum identifies the portions of the tape recording that include information protected by a common-law right of privacy under section 3(a)(1).

You have suggested that the confidential information is so intertwined with the rest of the information that it cannot be separated without giving an unfair picture of the essence of the conversation. We need not consider this argument, since the disclosable information on the tape is understandable by itself and is further illuminated by other information about this episode that has already been made public. We are returning the audio cassettes to you along with our memorandum identifying the open and closed portions of the tape recorded interview.

S U M M A R Y

Tape recordings of an interview between officials of Texas A & M University and a former student are "education records" within the Family Educational Rights and Privacy Act to the extent that they contain information about the former student's attendance at the university. Portions of the interview relating to the former student's recruitment by the university are also education records within the act.

Very truly yours,

A handwritten signature in dark ink that reads "Jim Mattox". The signature is written in a cursive, slightly stylized font. The first name "Jim" is written with a large, sweeping "J" and a small "i". The last name "Mattox" is written with a large "M" and a long, trailing "x".

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